# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-861

ADOLPH J. WAITKUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In March 1969, after a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of having willfully attempted to evade and defeat payment of substantial portions of his individual income tax for the calendar years 1962–1966, in violation of 26 U.S.C. 7201. He was sentenced to concurrent prison terms of two years on each of the five counts. The court of appeals affirmed (Pet. App. A) and denied rehearing (Pet. App. B).

The government's proof at trial was based on the net worth-expenditures method and showed that petitioner had understated his taxable income by approxi-



494-236—73

mately $24,600 in 1962, $26,000 in 1963, $33,300 in 1964, $32,400 in 1965, and $19,300 in 1966 (R. 95–96).[1] Petitioner does not now dispute the correctness or sufficiency of this proof.

Petitioner contends (Pet. 8–10) that investigating Special Agents of the Internal Revenue Service failed to provide him with the warnings required by Internal Revenue Service News Release No. 897, promulgated October 3, 1967, and that this alleged failure deprived him of due process of law. However, as the court below noted, the only interviews during which petitioner may not have been warned of his constitutional rights took place prior to October 3, 1967,[2] and petitioner was fully informed, even at the time of those interviews, of the purpose of the investigation (Pet. App. A, 5–6). Thus petitioner's contention that the investigating agents failed to comply with the applicable Internal Revenue Service procedures is factually erroneous. Furthermore, when the investigation reached a more serious stage, during the interview of September 19, 1967, petitioner was fully informed of his constitutional rights (Pet. App. A, 6). None of these interviews was custodial; petitioner remained free from indictment and arrest for several months thereafter. Thus, as petitioner apparently recognizes, nothing in this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436, required that warnings be given even

[1] "R." refers to the appendix filed in the court of appeals.

[2] Although petitioner claims that he was not given warnings at a subsequent interview on November 29, 1967, the courts below determined that "[a]t [that] office interview the agents read to [petitioner] a full and complete statement of his constitutional rights" (Pet. App. A, 6–7).

though some were in fact given at the latter stages of the investigation. See, *e.g.*, *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943.

Petitioner additionally contends (Pet. 10–12) that the Seventh Circuit should have given retroactive application to its decision in *United States* v. *Dickerson*, 413 F. 2d 1111, holding that a special agent must furnish a taxpayer with a full warning of constitutional rights upon first contact, whether or not the taxpayer is in custody. The *Dickerson* decision stands alone among the circuits,[3] and the court below acted well within its province in declining to extend that holding to interrogations taking place before the date of the decision. This Court has stated that a "'large measure of judicial discretion'" is permitted in determining the retroactivity of a decision requiring warnings of constitutional rights in situations where they were not previously mandated. *Jenkins* v. *Delaware*, 395 U.S. 213, 218. The Seventh Circuit properly exercised this discretion in view of the justifiable reliance by the Internal Revenue Service on prior de-

[3] All courts of appeals which have considered the question, except the Seventh Circuit, have held that since the taxpayer is not in custody or deprived of his freedom in any significant way the requirements of *Miranda* do not apply. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417–420 (C.A. 3); *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agamanos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

cisions contrary to *Dickerson*. The retroactive application of *Dickerson* would entail an unreasonable disruption of the criminal process, for tax evasion cases must sometimes be tried long after commission of the offense, due to the difficulties inherent in detecting and investigating such crimes. Cf. *Desist* v. *United States*, 394 U.S. 244, 249–254; *United States* v. *Gallagher*, 430 F. 2d 1222 (C.A. 7).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Solicitor General.*

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